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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

The Opinion Below

The Opinion of the California Supreme Court is reported at 53 C. 2d 819; 3 Cal. Rptr. 360, 350 P. 2d 112 (Tr. 365).

Jurisdiction

The Opinion of the California Supreme Court was entered on March 11, 1960 (Tr. 361). The petition for writ of certiorari was filed on June 10, 1960, and was granted on June 27, 1960 (Tr. 366), 363 U. S. 840.

Question Presented

Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?[1]

Constitutional Provisions and Statutes Involved

Pertinent provisions of the Constitution of the United States are as follows:

Amendment XIV, Section 1: "Nor shall any state deprive any person of life, liberty or property, without due process of law."

The pertinent provisions of Section 190 of the California Penal Code provide as follows:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the Court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1 . . ."

The pertinent provisions of Section 190.1 of the California Penal Code provide as follows:

> "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative the death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon

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[1] *Moya* v. *California*, 363 U. S. 840 (1960) (Tr. 366). The second question certified for review does not involve this petitioner.

be further proceedings on the issue of penalty, and the trier of facts shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the Court or jury trying the issue of fact on the evidence presented and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of eighteen years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the Court sitting without a jury, the trier of facts shall be the Court. If the defendant was convicted by a plea of guilty, the trier of facts shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact on the issue of penalty and the issue of sanity, if any, shall be the same jury unless, for good cause shown, the Court discharges that jury, in which case a new jury shall be drawn to determine the issue of penalty, or the issue of sanity or both such issues, as the case may be.

"On such further proceedings on the issue of penalty, any evidence concerning the commission of the crime admissible in the trial determining the guilt of the defendant may be admitted."

Pertinent provisions of Section 1033 of the California Penal Code provide as follows:

"A criminal action may be removed from the Court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county."

Pertinent provisions of Section 1034 of the California Penal Code provide as follows:

"The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant, a copy of which application must be served upon the District Attorney at least one day prior to the hearing of the application. At the hearing the District Attorney may serve and file such counter affidavits as he may deem advisable."

Pertinent provisions of Section 1035 of the California Penal Code provide as follows:

"If the Court be satisfied that the representations of the applicant are true, an Order must be made transferring the action to the proper Court at some convenient county free from a like objection."

Pertinent provisions of Section 1076 of the California Penal Code provide as follows:

"In a challenge for actual bias, the cause stated in the second subdivision of Section 1073 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; provided, it appear to the Court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

Statement of Facts

Petitioner Moya, age 20, was arrested on December 13, 1958, and was incarcerated from December 13, 1958 through December 30, 1958. Without benefit of legal counsel, petitioner was interrogated daily by law enforcement officers concerning his knowledge of the disappearance of Olga Duncan. Petitioner was not taken before a magistrate or afforded legal counsel until December 30, 1958.

Co-defendant Baldonado was arrested shortly after petitioner and was incarcerated and interrogated by law enforcement officers concerning the disappearance of Olga Duncan, without benefit of legal counsel and without appearance before a magistrate.

Elizabeth Duncan was arrested on or about December 15, 1958, and incarcerated in the Ventura County Jail on charges relating to her obtaining a fraudulent annulment between her son, Frank Duncan, and Olga Duncan.

At all times mentioned herein, Ventura County had a total population of approximately 170,000, which was rural in background and character. The two main cities were Ventura and Oxnard, each with a population of roughly 30,000 to 40,000. There were two daily newspapers published in Ventura County, The Ventura County Star-Free Press, hereinafter called Star Free Press, and the Oxnard Press Courier, hereafter called Press Courier. Ventura County is situated directly south of Santa Barbara County and directly north of Los Angeles County. Daily newspapers of Los Angeles County and Santa Barbara County had circulation in Ventura County including the Santa Barbara News Press, the Los Angeles Times, the Los Angeles Examiner, the Los Angeles Herald Express, and the Los Angeles Mirror News.

Immediately after the arrests, public news media reported events of the case in a sensational and dramatic manner. News media reports concerning the case largely emanated from the District Attorney and associated law enforcement officers. The following are summaries and extracts of some of the pertinent publications:

Exhibit 11-A, Star Free Press, December 16, 1958.

"LEAD SOUGHT IN BIZARRE PLOT"

"FAKE ANNULMENT CHARGE JAILS THREE; NURSE IS MISSING".

Front page photographs were published of Olga Duncan in a nurse's uniform with the caption, *"Miss Olga Duncan—Where Is She?"* A photograph of petitioner and of co-defendant Baldonado appeared with that of Olga Duncan on the front page. The article contained the following:

"Officers desperately are seeking new leads today in the disappearance of a beautiful Santa Barbara nurse on November 17 and are holding a man on suspicion of kidnapping and her mother-in-law on charges of faking an annulment. . . . Also in custody in Santa Barbara for questioning is Luis Estrada Moya, 22, Santa Barbara, a paroled convict. . . . In jail in lieu of $50,000 bail is Mrs. Elizabeth Duncan, 54, who has admitted to officers that she impersonated her daughter-in-law on August 7 and hired a young man named Ralph to impersonate her son in obtaining an annulment. Investigators said that she doesn't know the whereabouts of Ralph—that he was just a man she hired to help her in the ruse. . . . Investigators would not say why the probe into the fake annulment and the disappearance of Olga Duncan had gone on so long without an

earlier arrest. Investigation began in mid-October. Olga disappeared a month ago."

Exhibit 12, Star Free Press, December 17, 1958.

"AUTHORITIES FEAR ATTRACTIVE NURSE FOUL PLAY VICTIM"

The article contained the following:

"Authorities in Santa Barbara now are convinced that Olga Duncan, attractive thirty year old nurse and wife of attorney Frank Duncan, met with foul play. District Attorney Vernon Thomas said today that any hope of finding her alive is dwindling. . . . Investigating officers at Santa Barbara said that there was only one ray of hope to indicate Olga Kupczyk Duncan might be alive. It was discovered yesterday that there were several pieces of luggage missing from her apartment at 1114 Garden Street, Santa Barbara, where she was last seen November 17. It was previously thought the only items missing from her apartment were the nightclothes she was believed to be wearing. . . . It was added, too, that Frank Duncan, who had lived with her in the apartment only occasionally, had come and gone from the apartment several times since she was reported missing. Police have since changed the lock on the door to prevent further visits. . . . Investigating officers said that although Baldonado is not currently charged with participating in the Duncan case, it has been established that he and parole violator Luis Moya, 22, Santa Barbara, were in contact with the elder Mrs. Duncan prior to the disappearance of Olga. . . . It was the landlady at the apartment house where Olga lived who provided the information that the pretty nurse, an expectant mother in January, was deeply afraid of her mother-in-law. The landlady, who asked not to be identified, also said the elder Mrs. Duncan had stated

on one occasion that she would kill her daughter-in-law rather than have her son live with her.

"In Benito, Manitoba, railroad section foreman Elias Kupczyk, father of the missing woman, said his daughter wrote often to complain that she was afraid of her mother-in-law and that the older woman would come to the apartment where she lived and revile her. . . . Investigating officers in Santa Barbara said their fears of foul play mounted with reports from Olga's landlady that the young woman was deathly afraid of her mother-in-law. The landlady said the elder Mrs. Duncan frequently came to the apartment of her son's wife and Olga told the landlady that she feared for her life each time Mrs. Duncan came. It was thought for a while that Olga might have fled from her apartment and gone into hiding to escape from the woman she feared, but the length of her disappearance now leads authorities to believe she was forcibly taken from her apartment."

Exhibit 13, Star Free Press, December 18, 1958.

"EX-CONVICT SOUGHT FOR ROLE IN DUNCAN FAKE ANNULMENT"

"D.A. Says Man Posed As Lawyer"

The article contained the following:

"A felony complaint was issued today for Ralph Winterstein, a twenty-six year old ex-convict, on charges of forgery and perjury as the man who had impersonated a Santa Barbara attorney here on August 7th to obtain a false annulment. District Attorney Roy A. Gustafson praised the work of his investigators in identifying the new personality in this complicated web of events in the disappearance of thirty year old Olga

Kupczyk Duncan, wife of twenty-nine year old attorney Frank Patrick Duncan. Upon issuance of the complaint, Gustafson made the revelation that contrary to earlier information he did not know of the fake Duncan-Kupczyk annulment until November 20, three days after the disappearance of Olga from her Santa Barbara apartment. . . . Gustafson said he was not given the names until a month earlier: 'I feel very strongly' Gustafson said, 'that there might not have been any disappearance (of Olga Duncan) had we been able to move on the case in October.'."

"From attaches at St. Francis Hospital in Santa Barbara, from police, a doctor, and from Duncan himself, his romance and courtship of Olga could be traced. . . . Investigators say this is a possibility, but add that the situation could also be more tragic. Folks in the area have been alerted to watch for her body in the sea. The possibility of homicide was voiced yesterday in court by Gustafson as he opposed bail reduction on Elizabeth Duncan."

"Since 1949, investigators' reports show, she was married five times. (Referring to Elizabeth Duncan.) Three of the marriages ended in annulment, two in divorce."

The article then went on to recite the specific instances of the prior marriages and divorces and annulments of Elizabeth Duncan.

Exhibit 14, Star Free Press, December 19, 1958.

"KEY WITNESS IN DUNCAN CASE REVEALED"

"Case of Fake Annulment: Key Witness Gives DA Valuable Information"

The article described how Emma Short had come to the District Attorney's office in Ventura, giving information.

"A voluntary key witness in the fake annulment proceedings in Ventura August 7th has made valuable information available to District Attorney's investigators, it was reported today, and the witness is remaining in an undisclosed location. District Attorney Roy A. Gustafson said that Emma Short, an 82 year old Santa Barbara woman, has given information to his investigators concerning the trip she made with Mrs. Elizabeth Duncan to Ventura to obtain an annulment in the names of her son, Frank, and his wife, the missing 30 year old nurse and expectant mother, Olga Kupczyk Duncan. Mrs. Short, Gustafson said, has provided important information in the case and expressed her desire to have her whereabouts kept a secret. 'We are assisting her in doing so', Gustafson said."

"Other information on Mrs. Duncan's past has been coming into the hands of authorities since her arrest last Saturday. It has been found she has been married to at least five men since 1950 and has been divorced or the marriages annulled. 'She has been through enough annulment proceedings', Gustafson said, 'to have known that what she obtained here August 7th was not a legal annulment'."

"In San Francisco the police vice squad identified Mrs. Duncan as Betty Duncan Coghill who was arrested May 11, 1953, in a Sutter Street massage parlor where she acted as a hostess. At that time an agent of the vice squad posed as a customer and Mrs. Duncan asked him if he wanted a girl and took him to the back room where he was asked for a ten dollar fee. Mrs. Duncan was found guilty of soliciting, given a thirty day suspended sentence, and placed on one year's probation, police records show."

Exhibit 15, Star Free Press, December 20, 1958.

In reporting the filing of kidnap-murder charges against Elizabeth Duncan, Augustine Baldonado, and petitioner, the following appeared: "The case, which if written as fiction would be rejected by any editor as too improbable, entered this new phase with the testimony of a Santa Barbara cafe owner, Mrs. Esperanza Esquivel, who operates the Tropical Cafe, 431 State Street." The article in a dramatic and spectacular way described the manner in which the police had ordered the repairing of a street excavation job in front of Olga's apartment halted but that excavation and search of a body apparently will wait until Monday.

The article contained the following:

> "On December 4th, Elizabeth had Moya arrested in Santa Barbara on charges he was extorting money from her. Presumably this was the pay-off money. . . . In all, she is supposed to have paid Moya and Baldonado $3,000.00 for the killing. . . . The men paid $25 to rent a car in which bloodstains were found and returned a gun they had borrowed in damaged condition. On the latter point, police theorized that they struck Olga with the gun. They believe she was kidnapped while preparing for bed on the 9th."

Exhibit 3, Star Free Press, December 22, 1958.

"OLGA'S BODY FOUND IN COUNTY; NURSE WAS BEATEN, STRANGLED."

Pictures of the location of the victim's body appeared on Page 1 captioned as follows: "*Shallow hand-scooped grave —Sheriff-Detective Ray Higgins stands beside shallow Casitas Pass grave that held body of pretty Canadian nurse Olga Duncan and her unborn child. Dotted line indicated grave.*" There was published a photograph of Olga Duncan

captioned *"Struggled for life."* A photograph of Baldonado was captioned: *"Leads Way to Grave."* A photograph of Elizabeth Duncan was captioned: *"Smiles When Told Body Found."* A dramatic recitation of a confession of Baldonado appeared in the front page article:

"District Attorney Roy A. Gustafson said he will present the case to the Grand Jury Friday seeking indictments on charges of murder. . . . The woman had been pistol whipped, beaten repeatedly with a wrench, and strangled. . . . It was learned that she was lured to her death when she thought she was needed to help a man who was injured or ill. Moya is reported to have tricked her into thinking that 'his friend in the car' needed help. Although seven months pregnant and said by her doctor to be in a state of near shock from fear and worry, she put on a robe to see if she could give aid. . . . Since that time, the bizarre story has developed of a strange attraction of mother for son. Gustafson said he believed that motive for the hired killing was jealousy. The elder Mrs. Duncan flew into a rage when Frank Patrick Duncan, attorney with a prominent Santa Barbara law firm, married Olga. In letters to parents and relatives, Olga revealed that on her wedding night Mrs. Duncan threatened her life. For the next several months, information from Olga's letters and her reports to her physician indicated that she lived a nightmare. Mrs. Duncan harassed her continuously, the girl reported to friends and relatives. . . . Gustafson said he has evidence to indicate that Mrs. Duncan had previously tried to hire the killing of her son's wife. He would not elaborate, but said 'This is not the first time that Mrs. Duncan tried to have her (Olga) killed'. . . . Gustafson said the unusual case will be his first opportunity to try a case under the three

phase law he authored. The case he said, provided he obtains a Grand Jury indictment of the trio, will be tried in three steps. First the suspects will be tried to determine guilt, then to determine penalty, and finally to determine sanity. There is the possibility that since Olga was carrying a child of more than five months that authorities will consider the case double homicide. Gustafson talked to Mrs. Duncan last night in the County Jail. No disclosures were made as to the content of the discussion. He said today that the case has been developed as the result of outstanding police work on the part of investigators in his office and the Sheriff's Department. . . . The break in the case came yesterday morning when Ray Higgins, investigator for the Ventura County Sheriff's office, resumed questioning of Baldonado. . . . 'We were discussing the case and his involvement', he said 'when he jumped up and said "I'll do it for my kids" and started talking'. . . . This is the story Baldonado told:"

Thereupon, it was reported in detail in a spectacular way, the confession of Baldonado in substance being that Mrs. Elizabeth Duncan had hired him, Baldonado, and Moya to murder Olga Duncan. Following the recitation of the confession, there was a recapitulation of the case including a statement by Gustafson with reference to Frank Duncan: "Yesterday Gustafson said, 'He (Frank Duncan) asked us to put up or shut up.' Well, we put up." In the same issue of the Star Free Press, the district attorney released a written statement:

"D. A. URGES DEATH TERM IN KILLINGS"

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders in the face

of these events can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime. Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course, penalties do not completely deter drunken drivers, burglars, robbers, or other criminals and death penalties do not completely deter murderers, but that is no reason to dispense with penalties."

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrong-doer. From biblical times, a life for a life has been recognized as just and fair."

"The alternative in California, a life sentence which permits a prisoner to be paroled within 7 years simply is insufficient retaliation. I hope the people of this State rise up against the propaganda drive that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

Exhibit 16, Star Free Press, December 23, 1958.

"HUSBAND OF SLAIN NURSE MISSING, SOUGHT BY D. A."

"A subpoena has been issued for Frank P. Duncan, 29 year old Santa Barbara attorney and husband of murdered Olga Kupczyk Duncan, seeking his appearance before the Ventura County Grand Jury on Friday. District Attorney Roy A. Gustafson said the subpoena for Duncan was issued yesterday but that efforts thus far to locate him have not been successful. . . . Gustafson said he is preparing his presentation for the Grand

Jury Friday and will call 'maybe a dozen' witnesses. He indicated some of the principals in the case would appear, including Mrs. Duncan, Augustine Baldonado, 25 year old confessed killer of Olga Duncan; Mrs. Esperanza Esquivel, Santa Barbara, who reportedly introduced Baldonado and Luis E. Moya to Mrs. Duncan; Mrs. Emma D. Short, Santa Barbara, who accompanied Mrs. Duncan and Ralph Winterstein to Ventura August 7th to obtain a fake annulment of the Duncan-Kupczyk marriage. Mrs. Esquivel and Mrs. Short both had at their own request been hidden out for the past several days. Gustafson said there will be other witnesses, including the coroner, investigating officers, and some persons yet unnamed. Moya, 22 year old narcotics suspect, arrested on suspicion of parole violation, yesterday was transferred from Santa Barbara to Ventura County Jail. He was booked on the same charges here. Moya was named by Baldonado as the man who went to the apartment of Olga Duncan the night of November 17th and brought her to a waiting car. Baldonado has stated that Moya struck her with a gun, strangled her, and helped dig a shallow grave into which she was dumped, possibly still alive. . . . Gustafson said he discounted the blackmail claim and observed that as far as he was concerned the only reason Moya and Baldonado sought money from Mrs. Duncan was because 'they wanted the pay they were promised for the job they did' . . . Gustafson also commented on a report out of Santa Barbara that Baldonado had confessed nine days ago to the murder, 'There is no truth to the report that Baldonado confessed nine days ago', Gustafson said. . . . A coroner's autopsy report issued yesterday by Virgil Payton listed the cause of Olga's death as asphyxiation. The death could have been caused by

strangulation or suffocation, Payton said, posing the possibility that she was buried alive."

The December 23rd issue published a feature story on co-defendant Elizabeth Duncan:

"What's Mrs. Duncan Like?
She's Calm, Cool, Unruffled Prisoner."

"Mrs. Elizabeth Gold Coghill Gillis Sasso Satrano Sollene Nigh Duncan, much married 54 year old Santa Barbara 'housewife' is a very calm, unruffled prisoner in the Ventura County Jail . . . "

Exhibit 17, Star Free Press, December 24, 1958.

"OLGA'S DAD CLAIMS BODY"

"Nurse's Father in Visit to Ventura".

The article reported that the father of Olga Duncan had come to Ventura to claim the body of Olga Duncan.

"The daughter, Olga Kupczyk Duncan, was found in a shallow grave in Casitas Pass Sunday afternoon where she was buried, possibly alive, November 18. . . . Duncan is being sought as a witness in the inquiry into the death of his wife. No suspicion is directed at him in the case. 'He may have had knowledge of some of the facts in the case', Gustafson said, 'but he is not a suspect'. . . . Young Duncan had informed Gustafson that that date he had intended to waive a preliminary hearing and enter a plea on her behalf. Sullivan said that he does not plan to enter a plea at that time on behalf of Mrs. Duncan and will instead ask for a preliminary hearing. Gustafson said that if this occurs he will ask for a continuance. The District Attorney said he will need time to prepare his case on the fake annulment if Sullivan chooses to fight it. Mrs. Duncan

has admitted her part in obtaining the annulment in which she impersonated Olga and hired a man, identified as Ralph Winterstein, 26, to impersonate her son.

"In the meantime, Gustafson is busy reading through reams of reports prepared by Santa Barbara police, Sheriff's Officers, and FBI in the early investigation of the Duncan matter. He said his Christmas holidays will be spent analyzing and digesting these thousands of words and preparing for the Friday presentation to the Grand Jury. Reportedly subpoenaed in Santa Barbara to appear before the Grand Jury Friday are Frank Haywood, operator of the Blue Onion Cafe. It is alleged that Mrs. Duncan left with him an envelope containing money for Luis Moya, one of the murder for hire suspects. Also subpoenaed was Sarah Contreras, owner of a car rented to Moya and Augustine Baldonado and in which Baldonado has told authorities he and Moya went to Olga's apartment and carried her away to her death. Another witness said to be subpoenaed was James Chico Roho in Santa Barbara County Jail on a traffic charge who allegedly joined with Charles Cordero, 17, in furnishing a gun to Moya and Baldonado."

The publications in newspapers were paralleled in a spectacular way by television broadcasts as evidenced by the following:

"TV NEWSCASTER JOLTS GUSTAFSON—AND HIS WIFE".

"There was a sudden shock experienced in the household of District Attorney Roy A. Gustafson last night. He and his wife were watching television when commentator Clete Roberts closed a newscast on the current Duncan murder case by saying 'and on Friday the

District Attorney will go before the Grand Jury and seek a murder indictment against Mrs. Gustafson'. Mrs. Gustafson is said to have leaped from her chair and asked 'Wha-a-a-a-t?'. Today a telegram from Roberts arrived on the desk of Gustafson apologizing for the inadvertent but breathtaking error."

Exhibit 18, Star Free Press, December 26, 1958.

"MOYA ADMITS HE KIDNAPPED NURSE"

A front page photograph of petitioner and co-defendant Baldonado was captioned *"Partners—Luis Moya Talks with Augustine Baldonado, with whom he is charged with the kidnap-killing of attractive nurse Olga Duncan."* The article contained the following:

"Moya today admitted to the Grand Jury that he and Baldonado were hired for the job by Mrs. Elizabeth Duncan, mother-in-law of the slain girl, with a $6,000 price tag . . . District Attorney Roy A. Gustafson said he got word of the confession about 1:30 this morning, an hour and a half after Moya 'broke' under questioning by Deputy Sheriff Ray Higgins. . . . Gustafson gave full credit to Higgins for obtaining the confession and remarked that it was too bad that under the County's Civil Service personnel system a man of that ability was rated only as Deputy I, lowest on the pay scale. The District Attorney's investigator, Clarence Henderson, said that he had questioned Moya and was getting nowhere. 'I told Higgins to take over alone because I seemed to be hindering more than helping with Moya. He got the job done', Henderson said. . . . Moya reportedly told about the same story as Baldonado of the murder. Gustafson said the confession revealed the pair had driven to the apartment of Olga on November 18th and that Moya had gone to the door, telling the attractive nurse that her husband,

Frank, from whom she was estranged, was in the car and wanted to talk to her. . . . Gustafson said he had to remake his plans for a Grand Jury hearing at the last minute. . . . Moya then went before the Grand Jury and Gustafson told reporters that the youth testified on matters contained in his confession. Other witnesses were to be called this afternoon but Gustafson did not say whether he would now have to call all of the ones he previously had planned to question. . . . Duncan, the District Attorney pointed out, is not being questioned as a suspect, but as a witness to some of the activities which preceded the murder of his wife. . . . Baldonado has confessed participation in the kidnap slaying, and says he was hired with Moya by Mrs. Duncan, according to Gustafson."

"The murder case, one of the most bizarre in Ventura County history, has been top headline news of the State and Nation for more than one week. . . . Gustafson now had all three central figures in the slaying case in jail, but not as suspects in a murder. All were booked on other charges. Mrs. Duncan as a suspect in a fake annulment scheme, Moya as a parole violator, and Baldonado on failure to provide. This allows Gustafson to call all before the Grand Jury in the inquisition into Olga's murder. As defendants they could not be called. Now they must either testify or state their reasons which can only mean fear of self-incrimination."

Exhibit 5, Star Free Press, December 27, 1958.

"THREE INDICTED IN DEATH PLOT"

"Grand Jury Acts After One Day Probe".

"Deliberating only fifteen minutes after the final witness was heard, the Ventura County Grand Jury last night

indicted Mrs. Elizabeth Duncan, 54, and two confessed hired killers for the murder November 18th of Olga Kupczyk Duncan. . . . Although (Frank) Duncan himself remained in the hall of the court house's fifth floor with his attorney and a small regiment of newsmen and photographers, most of the other witnesses asked for more seclusion. They were kept in other parts of the court house until called for questioning and were then brought to the jury chambers via stairways, other offices, and back doors in an effort to avoid the clicking, flashing cameras. It was the reported confession of Moya early yesterday morning that appeared to clinch the indictments and swing the balance of evidence for the District Attorney. Baldonado had early confessed but Moya remained adamant until about midnight when he talked to Sheriff's office investigator Ray Higgins. Higgins, a 40 year old ex-torpedoman in the Navy, now retired, became a local hero in the proceedings when he obtained a confession despite the fact that he failed an examination for promotion recently and is the lowest paid deputy."

Exhibit 9, Star Free Press, December 29, 1958.

"HEART ATTACK SENDS MRS. DUNCAN TO HOSPITAL".

The article reported that Mrs. Elizabeth Duncan had had a heart attack and was taken to the Ventura County Hospital and returned to a cell.

"The doctor said there was no indication of a heart attack and placed Mrs. Duncan in a ward for observation. Because the only ward in the hospital for security is the psychiatric ward, Mrs. Duncan was placed there. She reportedly said she would rather be back in jail

than in the 'psycho' ward and was returned to her cell. . . . District Attorney Roy A. Gustafson this morning said that Mrs. Duncan's illness may have been real but added that 'this is a trick used by many persons in jail on a serious charge. It is known that suspects fake illnesses to get into a hospital where there is a chance for escape'. He said he recognized also that at a hospital there is an opportunity to obtain drugs and sleeping pills."

The article then reported that Mrs. Elizabeth Duncan had taken an overdose of sleeping pills in 1956 in Santa Barbara at which time Olga Duncan was her nurse and that is the method by which Frank Duncan and Olga Duncan became acquainted, and eventually married. The article described the funeral in Ventura of Olga Duncan and the reactions of the parents of Olga Duncan:

"Kupczyk buried his head in his hands and sobbed audibly at the mention of his daughter's name. Mrs. Kupczyk, first notified of her daughter's death by a Canadian newspaper, collapsed and has been hospitalized since that time."

"The nine hours of testimony before the Grand Jury is being transcribed by court reporters and stenographers. It will make a report of more than 250 typewritten pages it was reported. Persons who had an opportunity to see some of the material observed that it contained 'almost unbelievable information' of mystery thriller character."

"Gustafson said that he has received reports of written threats received by persons in Santa Barbara who have been questioned about the case. He said threats of bodily harm were made but that he doesn't know

whether this was the work of cranks or if the threats came from someone who might be involved in some way in the murder for hire case. Now that a Grand Jury indictment has been returned in the case, no further effort will be made to question Mrs. Duncan, it was stated by District Attorney's investigators."

Exhibit 9, Star Free Press, December 29, 1958 (editorial).

"DOING THE DIRTY WORK FOR THOSE NEIGHBORS"

"If the people of our demure neighboring Santa Barbara County are planning any more weird and revolting crimes, we hope they'll stage them on the home grounds. Ventura County's peace officers, prosecutors, courts and grand juries have enough to do looking after our own not inconsiderable malefactions without having to solve and handle such unbelievable and savage mysteries as lately have been dumped over our borders from the north. At least it appears likely at this writing that justice will be done in the case of these unwanted intruders. The facts indicate that some very competent police work has been accomplished by Ventura County investigators and there is fair prospect that in due time the strange assortment of barbarous characters involved will, one by one, meet up with his or her just deserts. Somebody certainly violated practically every rule, law, and ordinance of God and humanity in the course of the sordid sequence that is now under official review. The law requires that persons charged with crimes shall be deemed innocent until proven guilty and that being so, we shall deem those presently accused until the day the court pronounces its verdicts. In the interest of neighborly relations, we shall hope

that there will never be a next time and, second, that should there be another such crime, the community of origin will have to clean up its own frightful mess."

Exhibit 27, Press Courier, December 29, 1958 (editorial).

"THE DEATH PENALTY"

"The Grand Jury returned indictments on Friday in a case that has deeply shocked the whole state, the brutal killing of a blameless pregnant young woman. The utter callousness of this crime, the fumbling way in which the cruel deed was carried out, the stupidity that marked the conception and execution of the foul plot are extremely shocking. How many more people are there, one wonders, living in our county, who are capable of such a crime?

"District Attorney Gustafson last week used this crime as the text for a little sermon about capital punishment. We think his words are worth repeating and pondering. 'The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not an appropriate punishment for the perpetrators of such a crime. Many persons contend that the death penalty does not deter murder, but frankly, I am sick of this illogical argument. Of course, penalties do not completely deter crime, jail sentences do not completely deter drunken drivers, burglars, robbers, or other criminals, and death penalties do not completely deter murderers—but that is no reason to dispense with penalties. Retaliation is a basic instinct of the human race. The alternative in

California, a light sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda and drivel that has flooded us lately about the so-called evils of capital punishment. We must demand that California retain the death penalty to deal with situations such as the Duncan case.'

"Perhaps the time will come when society will have found a way to deter, through intelligence and other tests, the probable criminal and find a way to care for him and perhaps cure him, before he can make innocent persons the victims of his evil nature. But that time is far into the future. Until it has arrived, until we know that tests of youngsters will prove out those who must, for their own and society's good, put safety to one side, we dare not dispense with capital punishment. This whole nation, and indeed the world of free men, is depending upon the power of retaliation to prevent another world war. We have the weapons and have made it clear that we will use them, in any sneak attack that is made upon us. Those retaliatory weapons are the atomic bombs and warheads which any rash aggressor knows will rain upon his nation, killing men and women and children by the thousands, perhaps by the millions. Perhaps this will not deter the warmakers. But we have pinned our faith in our nation's safety upon them. If the nation can do this, the state can hold out certain retaliation of society through the death penalty, is the price the calloused murderer will pay for his taking an innocent life."

Exhibit 8, Star Free Press, December 30, 1958.

Front page photographs were published of petitioner and co-defendants being arraigned before Judge Blackstock.

"LURID MURDER PLOT BARRED IN TRANSCRIPT".

"Secret Testimony Tells of 'Hiring'".

The article pointed out that at the precise moment that the arraignment was called, 9:30 A.M., private funeral services were being conducted across town for the victim, Mrs. Olga Duncan. In describing the arraignment, it was reported:

"Later, however, when photographers tried to get her (Elizabeth Duncan) to pose with Baldonado and Moya, she struggled with deputy Mary Forgey in the hall. The trio finally lined up, whereupon Baldonado was heard to say (to Elizabeth Duncan): 'What's the matter, you ashamed of what you've done?' . . . An overflow crowd was in the courtroom for the arraignment including many representatives of the Los Angeles press. Television cameras whirred during the court proceedings. Arraignments are generally handled by a Deputy District Attorney but Gustafson appeared in person for this one. He told reporters there is still a missing witness in the case. He said the witness, a woman, whom he refused to identify, was supposed to appear before the Grand Jury last week, but failed to show. A contempt citation has been issued, he said."

"ROY GUSTAFSON EXPLAINS WHY HE WILL ASK DEATH PENALTY FOR DUNCAN MURDER TRIO."

"'When you catch 'em and when you do convict 'em, what are you going to do with them. . . . rehabilitate them?' According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons arraigned today on charges of murder for hire are 'awfully slim . . . and I don't want to take that kind of chance.' That is one of the reasons why he is

going to ask for the death penalty against Mrs. Elizabeth Duncan and her two accused accomplices, Augustine Baldonado and Luis Moya, in the hired slaying of Nurse Olga Duncan. Gustafson repeated his plans yesterday and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty. . . . But he believes that the Duncan case and other torture sex slayings attributed to confessed killer Harvey Glatman of San Diego County will deter a number of legislators from voting for abolition during the coming legislative session. . . . The most pertinent part in the death penalty is retribution. Anyone who says we must get away from the 'barbaric though' of retribution is not being realistic. Retribution, he says, is one of the four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation statistics are 'pretty sad', he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A life without hope of ever leaving prison 'has no hope and becomes a vegetable. Or worse as we'll show you later'. But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a one to ten year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case. By the state's own figures, 48.5 per cent of parolees would end up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 per cent. And the rate is going up, not down, he points out. Still, he says, 'It's a goal worth pursuing. But I think you have to be choosey about the people you are willing to take chances on.'

"Fourth on Gustafson's list of points in punishment is protection of society. And he says, 'You can say a life term protects society outside of prison. But what does it do inside? Even the warden who favors doing away with the death penalty still wants to have it kept in prison killings. These people could kill guards and each other and know that they already had the worst possible penalty. And remember, there is always the chance that someone could let him out or he could escape or the law could be changed to let him go free.'

"The death penalty, he says, 'will not deter all crimes, but it will certainly keep murder to a minimum. Look what it did to kidnapping! The Lindbergh Law is a prime example', Gustafson says, 'of society solving a criminal problem. Prior to it, kidnapping had been a fairly common crime. In order to solve crime problems', says the District Attorney, 'you must have "certainty of apprehension, certainty of conviction, and certainty of adequate punishment." The Lindbergh Law has all three.'

"In that light, why would anyone commit murder? 'They think they won't get caught', he answers. 'Lots of them aren't caught. Lots of them think even if they are caught and convicted, they won't be executed.' He noted that statewide, only 57% of those who contest criminal court cases are convicted.

"He comments that the possibility of putting California's third woman in the gas chamber does not present him with any qualms. 'This is appropriate punishment', he said, paraphrasing the judge in the Harvey Glatman case. And he adds, 'What are you going to do, rehabilitate 'em?'"

Exhibit 30, Los Angeles Times, December 22, 1958.

"BRIDE'S BODY FOUND; KILLING ADMITTED"

"Body of Missing Bride Unearthed. Man Confesses, Points to Grave; May Have Been Buried Alive."

In the article following was a vivid description of the confession of Baldonado and the discovery of the body.

"Officers hinted that Mrs. Olga Duncan may have still been alive when she was placed in the grave which Baldonado said he dug with his bare hands . . . Payton said Mrs. Olga Duncan's unborn child was more than five months in gestation and therefore had to be listed as a second death. The District Attorney was quoted as stating: 'I was tired of waiting for somebody to do something with this case, so I ordered my men to question Baldonado' . . . Two key witnesses in any prosecution against the three persons have been spurted to undisclosed hiding places at their request, police reported . . . Last night police discussed the possibility of placing a guard with her (Mrs. Esquivel) although they emphasized that she is not under arrest or in custody. . . . Santa Barbara police disclosed tonight that they had known of the murder plot since December 12, when they were told of it by Mrs. Emma Short . . . Santa Barbara police said Mrs. Short claimed that her life was in danger if Mrs. Elizabeth Duncan knew she talked to police."

Exhibit 31, Los Angeles Times, December 23, 1958.

"BLACKMAIL CHARGED IN BRIDE SLAYING".

"Gustafson virtually pledged himself to seek the death penalty for the trio in a statement he issued to reporters in support of capital punishment. In the statement he called the murder of the pretty Canadian nurse 'brutal,

calculated, revolting killing for hire'. The Olga Duncan slaying, Gustafson said, 'is one of a number of horrible crimes which have been committed in California. I simply cannot understand how some of our leaders in the face of these events can seriously contend that the death penalty is not appropriate punishment.' The people of California, Gustafson said, 'must demand the death penalty to deal with such situations as the Duncan case.'

"In Los Angeles, Police Chief Parker revealed that lie detector tests given to important witnesses in the police crime laboratories there more than a week ago helped to break the case. Parker said Mrs. Emma Short, 84, of Santa Barbara, was taken to Los Angeles December 12 and under the questioning of J. A. McAllister, polygraph technician, 'told quite a story'. Mrs. Short, a friend of the elder Mrs. Duncan . . . revealed the name of Mrs. Esperanza Esquivel, Parker said. Mrs. Esquival, Santa Barbara cafe operator, was given a lie detector test December 14 and disclosed that Mrs. Duncan had asked her to help find someone who would get rid of her daughter-in-law, that she introduced Mrs. Duncan to Moya and Baldonado, that they rented the kidnap car from Mrs. Sarah Contreras, Parker revealed. Mrs. Short and Mrs. Esquival have been secreted away at their own request."

Exhibit 32, Los Angeles Times, December 31, 1958.

An article reported:

"Gustafson, declaiming that he 'wouldn't stipulate to anything but the death penalty' for all defendants, estimated it will be about six weeks before the trial can get under way. The testimony given in secret before the Grand Jury last Friday and made public today,

painted an almost unbelievable picture of a possessive mother so agitated over losing her son's affection to another woman that she would stop at nothing to prevent it."

Exhibit 1, Press Courier, January 7, 1959.

A courtroom scene was described as follows:

"In a packed courtroom, Mrs. Duncan clearly said 'not guilty to the charge'. Her attorney, S. Ward Sullivan of Los Angeles, added a plea 'not guilty by reason of insanity' and a throng of courtroom spectators groaned. . . . The crowd which had begun gathering before noon and had overflowed into the hallway, murmured as the proceedings started. . . . People were wedged in the aisles and along the walls of the courtroom. Outside the courtroom, they jammed the hallway, blocked doorways and spilled over into stairways. Some were standing on benches to get a better view during the rare moments when the courtroom door would open and they could peek in. . . . Handcuffs were placed on Mrs. Duncan. A few minutes later she, Moya and Baldonado were led back to their cells, through the back door of the court and out a rear door to prevent any turmoil."

Exhibit 2, Los Angeles Examiner, January 7, 1959.

It was reported that a courtroom crowd numbered 1,000 persons, that the crowd was "hostile" and that "a middle-aged woman aimed a smashing blow at her (Elizabeth Duncan) with her purse".

Exhibit 28, Press Courier, December 31, 1958.

"MOYA TELLS HOW NURSE DIED, SCREAMING AND STRUGGLING".

Below this was an editor's note: "Printed below is a continuation of the testimony of Luis Moya, 20, of Santa Barbara,

before the Ventura County Grand Jury December 26. In the parts of the transcript printed in yesterday's Press Courier, Moya testified . . ." The entire page of the newspaper was then taken up with the transcript of petitioner's testimony along with photographs of him.

On January 13, 1960, petitioner moved for change of venue on grounds that a fair and impartial trial could not be held in the County of Ventura within the meaning of Section 1033 of the Penal Code of California. The motion was supported by affidavits from responsible persons residing in the County of Ventura who had opportunity to learn of public opinion. Each verified the widespread prejudice against petitioner caused by the news media publicity and published statements of the District Attorney and other law enforcement officers. The affidavits represented that even school children were familiar with the case, that petitioner and co-defendants had been referred to in vile and profane terms, that opinions were stated suggesting that the lynch law should be applied and that petitioner's counsel was subjected to ridicule for his representation of petitioner. Newspaper exhibits were presented to the trial judge as evidence of public feeling and as evidence of the manner and scope of the publicity attending the case. The motion for change of venue was taken under submission.

On January 13, Judge Blackstock set the trial for petitioner and co-defendants for February 16, 1959, approximately 30 days hence. Counsel for co-defendant Baldonado moved for a continuance because of pending cases, which motion was summarily denied by Judge Blackstock with the comment to counsel for co-defendant Baldonado, "I have never known you to be quite that busy before" (Tr. 110).

On January 15, 1959, Judge Blackstock denied the motion for change of venue with the comment, "It is a sad com-

mentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this county" (Tr. 137). This comment was published in the Star Free Press, in the January 15, 1959 (Exhibit A-2).

On January 20, 1959, petitioner moved for a continuance on the grounds that counsel had insufficient time to prepare for trial. This motion was summarily denied by Judge Blackstock (Tr. 151).

Exhibit A-39, Star Free Press, January 19, 1959.

"FBI ARRESTS DUNCAN CASE MISSING MAN"

"The missing figure in the Olga Duncan case has been found"

Exhibit A-3, Star Free Press, January 20, 1959.

Ralph Winterstein was pictured in handcuffs in a front page photograph with a headline "EXTRADITION OF WINTERSTEIN SOUGHT BY D.A."

An editorial was published explaining why certain letters to the editor had not been published:

"Some letters that come to the editor from our readers did not appear in the Vox Pop column. There have been a few, lately, for instance, expressing opinions about issues in a pending murder trial. Their publication, we think, would plainly tend to prejudice prospective jurors and very well might get the writer and probably the editor, too, into contempt of court and difficulties."

Exhibit A-8, Star Free Press, January 23, 1959.

"DUNCAN TRIAL ATTRACTS WIDE PRESS COVERAGE".

"Newspapers as far away as England want to cover the Duncan murder trial which starts in Ventura County Superior Court February 16 . . . County Clerk-Recorder Bob Hamm said the Hollywood correspondent of the London Daily Mirror is among ten news media representatives who so far have requested space. . . . He said he has no idea how many newspapers, magazines, radio and TV stations. A special press room is being set up in the back of the County Clerk's office and as many media as desire may have their own special phones installed. . . . There has been no special lighting in the courtroom, Judge Blackstock said, but a couple of banks of lights which have been kept dark in recent years may be turned on for the benefit of photographers. There will be no 'live' radio or TV broadcasts of the trial, Judge Blackstock ruled . . ."

Exhibit A-4, Star Free Press, January 29, 1959.

Trial Judge Blackstock, rather than attempting to minimize the publicity of the case, appeared to openly encourage it. Press photography was permitted during each court session, and photographs of the court sessions preliminary to trial were published. On January 29, 1959, petitioner withdrew his plea of not guilty, and a trial on his penalty and sanity was set for April 20. This proceeding was given immense publicity, under the headline: "MOYA ADMITS NURSE'S MURDER".

Exhibit A-7, Star Free Press, February 14, 1959.

"DUNCAN TRIAL STARTS MONDAY"

The article contained a recapitulation of the case and published the following:

"District Attorney Roy A. Gustafson is expected to try to show a fiercely jealous Mrs. Duncan hired killers because she wanted her lawyer son, Frank, for herself. It is this facet of the case, the relationship between mother and son, which has resulted in much of the national publicity. Metropolitan newspapers and magazines have alluded to Sidney Kingsley's Pulitzer Prize winning play, 'The Silver Cord' in discussing the case. This is a drama of an unnaturally close relationship of mother and son".

"D.A. TO PROSECUTE DUNCAN CASE ALONE: SEEKS DEATH PENALTY".

Under a photograph of the District Attorney, the article contained among other things the following: "The Duncan Case will make the third time Gustafson has asked a Ventura County Jury for the death penalty. The other two times, juries gave him what he asked, although only one defendant was executed. Gustafson's office has consistently been at or near the top statistically."

"PRESS READY TO TURN OUT FOR DUNCAN MURDER TRIAL".

"The Press will be out in force Monday when the Duncan Murder Trial begins in Judge Blackstock's Superior Court. . . . As of yesterday morning, County Clerk-Recorder Bob Hamm had reservations from 15 news media for 25 photographers and reporters to be on hand. . . . Special phones were being strung in a back room of the Clerk's Office yesterday which will function as a Press Room throughout the trial. Newspapers, radio and TV stations and newswire services who have indicated they will send one or more people are the following: Ventura County Star Free Press;

Oxnard Press Courier; the local radio stations KVEN, KUDU, and KACY. The four Los Angeles Metropolitan newspapers, Times, Examiner, Herald Express and Mirror News; London, England, Daily Mirror; San Francisco Chronicle; Santa Barbara News Press; United Press International; Los Angeles Radio Station KFWB; Los Angeles Television Station KTLA."

Exhibit A-9, Star Free Press, February 16, 1959.

The Elizabeth Duncan Trial commenced on February 16, 1959, in the atmosphere described in by headline: "BIG CROWD JAMS DUNCAN TRIAL". The issue also published an article concerning Judge Blackstock celebrating his 83rd birthday.

Exhibit A-40, Star Free Press, February 18, 1959.

Press and television coverage of the Elizabeth Duncan Trial was very great and added much spectacular to the case. Witnesses were photographed by still and moving cameras while testifying on the witness stand, attorneys were photographed in questioning of jurors and witnesses and in argument and even Judge Blackstock was photographed. This only served to magnify and intensify the public prejudice as evidenced by the report: "Before going back to her cell after Court had adjourned, Mrs. Duncan told reporters of some of the mail she had been receiving. She said she got 15 to 20 threatening letters, most of them signed and some containing real bad pictures. One, she said, showed a person hanging from a tree and another showed someone sitting in the electric chair, she said."

The articles were generally laudatory of the District Attorney as evidenced by the above wherein five separate pictures were published side by side of the District Attorney with captions underneath reading as follows: "Working

with his hands for emphasis, District Attorney Roy Gustafson takes his turn at quizzing prospective murder trial jurors". The above also reported: "Before the 4th day of the trial started this morning, Mrs. Duncan showed the press a newspaper clipping on which threats had been scrawled . . . among the remarks written in red ink on the paper was 'I could cut your throat' and 'You should have died before you were born' . . . Mrs. Duncan said the newspaper clipping was received by her son, Frank, yesterday. Other remarks included: 'Sap Mama's Boy' and 'Hope you hang, you - - - - -.'" There were also published descriptions of the questioning of jurors on voir dire examination and the various challenges: "In each instance where Gustafson has opposed Sullivan's challenge of a juror, the challenge has been denied by Judge Blackstock."

Exhibit A-16, Star Free Press, February 26, 1959.

The Courtroom was jammed to capacity each day of the Elizabeth Duncan trial with lines of people waiting outside to get into the courtroom. The above published a photograph of petitioner testifying in the Elizabeth Duncan case with a headline:

"FRANK DUNCAN WEEPS AS
OLGA'S KILLING DESCRIBED"

An article reported:

"Repeatedly yesterday, Sullivan made legal objections to the admission of testimony and in some cases the entire testimony of some witnesses. Mostly, he was over-ruled by Judge Blackstock. Several times, the audience was heard to titter when Judge Blackstock made his rulings . . . Again yesterday, rope restrained the crowd and seats were at a premium. Some sat through the two-hour lunch period to assure themselves seats for the afternoon recess . . . After Sullivan made

a protest, the Court ruled that Mrs. Duncan is no longer to be handcuffed when in the presence of jurors."

Exhibit A-50, Star Free Press, March 10, 1959.

The tenor of the courtroom crowd and the community was well described in the above: "This morning, when entering the courtroom, Frank Duncan strolled tight-lipped by the line of spectators waiting to get into the courtroom. There were calls of 'Yoohoo, Frankie', 'Mama's Boy', and 'Going up to see Mama, Frankie?' . . . Defense Counsel S. Ward Sullivan lost his bid for a mis-trial late yesterday, for the first time since the trial opened four weeks ago, the audience broke into handclapping when Judge Blackstock announced his decision."

Exhibit A-51, Star Free Press, March 11, 1959.

The following was reported:

"Again yesterday there were big crowds in the courtroom corridors. United Press International interviewed Mrs. Edna Westbrook and Mrs. Dorothy Clark, both of Oak View (Ventura County), who said they had come to the courtroom at 3:30 a.m. to be first in line. Many persons reportedly breakfasted in the corridors while waiting for the 10:00 a.m. opening of Court."

Exhibit A-54, Star Free Press, March 16, 1959.

On March 16, 1959, the Elizabeth Duncan jury went out to deliberate following arguments. The district attorney released the following written statement to the press:

"GUSTAFSON EXPLAINS 'BAD LIGHT'".

"(Editor's Note: District Attorney Roy A. Gustafson issued the following statement concerning his summa-

tion of the Duncan murder trial. Summation was reported in the Star Free Press Saturday.)

"During the argument of the Duncan case last Friday, March 13, 1959, I made a statement which put Judge E. Perry Churchill and Hal Hammons, Jr., in a bad light to those who did not know all of the facts. I want to state the facts fully so that people of Ventura County will realize that their actions were reasonable under the circumstances.

"'On October 15, 1958, Mr. Hal Hammons made a full disclosure to Judge Churchill of the facts of the fraudulent annulment secured by Mrs. Elizabeth Duncan in the name of her son, Frank. Judge Churchill advised Mr. Hammons that the matter should be reported to me immediately. Mr. Hammons came to my office that same day and disclosed all of the case to one of my deputies except the names of the people involved. Mr. Hammons stated the facts as an actual case and not as a hypothetical case. He stated that he was concerned about his obligation to maintain the secrecy of confidential communications given to him as a lawyer, and for that reason he did not want to disclose the names at that time.

"'About the same time I saw Judge Churchill, and he asked if Mr. Hammons had reported the matter to me. I replied that he had, but that he had not given me the names. Judge Churchill stated that the fraud had apparently been perpetrated by the mother of a young Santa Barbara lawyer and that the young lawyer had been in to see Judge Churchill shortly before. Judge Churchill had advised the young man to see the District Attorney. The Judge wanted to know whether the young man had seen me, and I replied that he had not. We discussed Mr. Hammons' problem concerning

confidential communications, and I informed Judge Churchill that I had not yet had an opportunity to research the point. The Judge suggested that the young lawyer involved, as an officer of the Court, and in the interests of his own reputation, should be interested in bringing his mother before the Court, and that perhaps the requirements of justice would be served in the event of such a voluntary appearance, if the mother were punished for contempt of Court. Judge Churchill suggested that perhaps the young lawyer should be given an opportunity.

"'I discussed the suggestion with Mr. Hammons on the telephone, and he said he would try to get in touch with the young lawyer to see if the lawyer would bring his mother in. We also discussed whether Mr. Hammons was obliged by legal ethics to withhold the names from me, and while I told him that I thought he had no duty to do so, I said I had not researched the point but I would try to do so. Before he was able to reach Frank Duncan, Mr. Hammons left on vacation and nothing further was done by Mr. Hammons, Judge Churchill, or me.

"'From the information I had, I could probably have ascertained through investigation who the young lawyer was. However, I felt that I should not do this when the proposed procedure seemed reasonable. I further thought that if the contemplated contempt of Court procedure occurred, the facts might indicate that the punishment there imposed would be adequate.

"'I learned the names of the attorney and mother on November 20, 1958, from a Santa Barbara source. I immediately called Judge Churchill and Mr. Hammons and informed them that I no longer felt bound not to proceed with a criminal investigation. Mr. Hammons

and Judge Churchill fully cooperated in the ensuing investigation.

"'In my argument last Friday I used the word "ashamed" with reference to the actions of some judges and lawyers. I intended to and should have said that I regret, as I am sure they do, that the procedures actually allowed a delay during which the after-events proved Mrs. Duncan was actually conspiring to take the life of her daughter-in-law.

"'I sincerely hope that this statement will receive as wide publicity as my remarks during my argument so that the erroneous impression which I gave will be erased.'"

The Star Free Press then published an "extra" on the verdict of guilty stating that it was the first "Extra" edition since V-J Day in 1945. It was reported:

"Reporters raced along the corridors and the crowd of spectators milled for seats. . . . When Peacock (Court Clerk) pronounced the fateful words Guilty of Murder in the first degree a stir and something like a sigh ran through the courtroom, which was nearly filled with spectators. . . . District Attorney Roy A. Gustafson said: 'If I didn't believe her guilty, I wouldn't have prosecuted her'."

Exhibit A-55, Star Free Press, March 18, 1959.

Referring to the trial of Mrs. Elizabeth Duncan, the following was reported:

"He (Gustafson) noted that the guilty verdict returned Monday maintained his record of never having failed to convince a jury of the guilt of a defendant in the 20 or so jury trials that he has handled personally."

Exhibit A-36, Star Free Press, March 21, 1959.

"MRS. DUNCAN TO DIE"

"District Attorney Roy A. Gustafson hailed the verdict and said it should have an effect on heading off moves to abolish the death penalty in California."

Coinciding with a headline in the Ventura County Star Free Press of March 23, 1959 (Exhibit A-58), "DUNCAN SANITY HEARING EXPECTED TO BE BRIEF", the District Attorney published a description of the trial record of the District Attorney during the year 1958 with a headline on page 1 as follows: "D.A. CONVICTION RATE HITS 97.7 PERCENT ON FELONIES".

Petitioner was referred to consistently throughout the Elizabeth Duncan trial and was a witness. He was consistently referred to as a "Confessed killer" or "Killer for hire", and petitioner and two defendants were referred to as "A Murder Trio". The publicity of the Elizabeth Duncan trial continued until the time she was actually sentenced to death on April 3, 1959.

Exhibit A-89, Press Courier, April 9, 1959.

"BALDONADO GETS GAS CHAMBER; JURY DELIBERATES LESS THAN TWO HOURS".

The penalty trial of co-defendant Baldonado commenced on April 6, 1959, and was concluded on April 9, 1959. The daily newspapers again published actual photographs of courtroom proceedings.

It was reported: "The jury was polled and Judge Blackstock said 'The jury is unanimous as it has to be'. He complimented the jurors as thoughtful and conscientious and said 'they showed the proper amount of courage and I am proud of you.'."

Publicity continued as on April 14, petitioner appeared in court on a motion by the Attorney General of the State of California to quash a subpoena served upon Warden Fred Dixon of San Quentin Prison. On April 16, 1959, petitioner moved again for a change of venue on the grounds that a fair and impartial trial could not be held within the County of Ventura. The motion was supported by affidavit which incorporated by reference the many newspaper exhibits illustrating the publicity given the trials of and the results of the trials of co-defendants Duncan and Baldonado. Affidavit verified the continuing wide-spread and intense prejudice against petitioner and co-defendants. Although no counter-affidavits were submitted by the District Attorney, the motion for change of venue was summarily denied (Tr. 165-170).

Petitioner's penalty trial commenced on April 20, 1959. Even with the limited question of penalty at issue, 72 prospective jurors were examined on voir dire examination. Ten were excused when challenged for cause by petitioner because they had fixed opinions concerning what penalty should be inflicted upon petitioner. Twenty-four were excused for having conscientious objection against the death penalty. One was excused by stipulation because of physical incapacity. All of the jurors examined had either read newspaper articles about the case, viewed television broadcasts concerning the case, heard radio broadcasts concerning the case, discussed the case and heard the case discussed, knew that both co-defendants had received the death penalty, had read the published statements of the district attorney, had read the comments of the trial judge complimenting another jury when it returned a death verdict for co-defendant Baldonado after a deliberation of less than two hours. Petitioner exhausted all 20 peremptory challenges. The jury, as constituted, was composed of six regu-

lar jurors with opinions as to what penalty should be imposed upon petitioner (Tr. 193-349).

After arguments and instructions, the jury retired to deliberate on April 29, 1959. The jury was returned to the courtroom upon its request that the testimony of Dr. Harvey and petitioner be read back by the Reporter. After hearing the testimony of Dr. Harvey read back by the Court Reporter, Judge Blackstock ordered the bailiff to take the jury to dinner and to bring them back as soon as they were through. The jury was never returned to the courtroom to hear the testimony of petitioner read back and subsequently returned a death verdict (Tr. 360-361).

On May 7, 1959, petitioner moved for a new trial which was denied and a sentence of death was imposed (Tr. 175-189).

Summary of Argument

Under California Law, petitioner was entitled to a jury trial, the sole issue of which was to determine his penalty for the crime of first degree murder. Prior to the commencement of his trial, there was an accumulation of the following:

(a) Extensive pre-trial publication by news media of details of case investigation, photographs of participants, photographs of the body of the deceased and alleged confessions of defendant and co-defendant;

(b) Headlined pre-trial publication by news media of inflammatory statements of the District Attorney urging the death penalty for defendant and explaining why he will seek the death penalty for defendant;

(c) Pre-trial publication by news media of verbatim testimony received by the Grand Jury returning the indictment;

(d) Pre-trial publication by news media of photographs of courtroom scenes, of arraignment and other appearances of defendant, which courtroom photography was permitted by the trial judge;

(e) Pre-trial publication by news media of photographs and moving pictures of the courtroom during the trial of a co-defendant, including photographs of the trial judge on the bench, defendant and other witnesses testifying, jurors in the jury box, jurors being questioned by counsel and counsel arguments;

(f) The pre-trial publication of comments of the trial judge to a jury in a co-defendant's case commending said jury when it returned a death verdict after less than two hours of deliberation;

(g) The pre-trial publication of comments of the trial judge inferring that counsel for petitioner was attacking the integrity, decency and humanity of the people of the county by making a motion for change of venue;

(h) The denial by the trial judge of motions for change of venue in the face of open courtroom hostility and evidence of community hostility evidenced by affidavits from responsible citizens.

As a result of the above circumstances petitioner was deprived of his right to a fair trial, and hence the judgment deprives him of life without due process of law, as guaranteed by the XIVth Amendment to the Constitution of the United States; the judgment sentencing him to death ought to be reversed with instructions that the penalty issue be retried in a county in California less susceptible to the District Attorney's prejudicial statements.

ARGUMENT

I

In a Capital Case, Due Process Is Denied When a Trial Is Influenced by Prejudicial Action of the District Attorney and Other Law Enforcement Officers.

The right to a fair and impartial trial is protected by the due process clause of the Fourteenth Amendment as a fundamental right implicit in the concept of ordered liberty. *Chambers* v. *Florida*, 209 U.S. 227; *Moore* v. *Dempsey*, 261 U.S. 86; *Snyder* v. *Massachusetts*, 291 U.S. 97; *Palko* v. *Connecticut*, 302 U.S. 319.

A fair trial is denied when prejudicial influences from outside the courtroom affect the conduct and outcome of the trial. *Frank* v. *Mangum*, 237 U.S. 309; *Shepherd* v. *Florida*, 341 U.S. 50. Due process is denied when pre-trial news publications of prejudicial and inflammatory material have affected the conduct and outcome of the trial. *Stroble* v. *California*, 343 U.S. 181.

The actions of a prosecutor in publishing prejudicial and inflammatory materials prior to trial has been condemned and held improper. *Stroble* v. *California*, *supra*, J. Frankfurter dissent; *Shepherd* v. *Florida*, *supra*, JJ. Jackson and Frankfurter concurring opinion; *In Re Savoy*, 360 U.S. 622, JJ. Frankfurter, Harlan, Clark and Whittaker concurring opinion; *Pennekamp* v. *Florida*, 328 U.S. 331, J. Frankfurter concurring opinion.

A conviction cannot stand when it is brought about by methods which "offend the sense of justice" or "shock the conscience". *Rochin* v. *California*, 342 U.S. 165; *Brown* v. *Mississippi*, 297 U.S. 278. Due process is denied when a trial is fatally infected with an absence of that fairness

essential to the very concept of justice. *Lisenba* v. *California*, 314 U.S. 219.

Capital offense cases justify greater scrutiny of due process as stated in *Reid* v. *Covert*, 354 U.S. 1, J. Harlan concurring opinion on p. 77:

> "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases, the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial when the judge and trier of facts are not responsive to the commands of the convening authority. I do not concede that whatever process is due an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . compare *Powell* v. *Alabama*, 287 U.S. 45, with *Betts* v. *Brady*, 316 U.S. 455; nor is it negligible, being literally that between life and death."

II

Pre-Trial News Publications of Prejudicial Material Engendered a Community Atmosphere Wherein Petitioner Could Not Be Afforded a Fair and Impartial Trial.

A. *Under California law, a penalty trial is governed by the same rules of procedure as a trial on the issue of guilt.*

Section 190.1 of the California Penal Code was enacted (1) to eliminate the so-called "silent verdict" rule which had theretofore provided for imposition of the death penalty in the absence of a recommendation for life imprisonment; (2) to vest the trier of facts with absolute discretion to fix the penalty at either life imprisonment or death; and (3) to provide for an adversary trial proceeding wherein

competent, material and relevant evidence could be presented to the trier of facts concerning the penalty to be imposed. *People* v. *Friend*, 27 C. 2d 749, 306 P. 2d 463; *People* v. *Green*, 47 C. 2d 209, 302 P. 2d 307; *People* v. *Jones*, 52 C. 2d 636, 343 P. 2d 577.

Section 190.1 provides for a trial in the full technical sense and is governed by the same rules of procedure as any trial on the issue of guilt. *People* v. *Purvis*, 52 C. 2d 871, 346 P. 2d 22; *People* v. *Jones, supra.*

B. *The principal source of the pre-trial publications was the district attorney and other law enforcement officers.*

The Courts have recognized some distinction among the following cases: (1) The pre-trial publication of material obtained by news media through its own individual investigation or when the material has been obtained as "public property" in an official public proceeding; (2) The pre-trial publication of material released to news media by governmental officials or by the prosecutor. *Delaney* v. *U. S.* (C.A. 1st), 199 F. 2d 107, *Shepherd* v. *Florida, supra; Stroble* v. *California, supra;* Anno. 39 ALR 2d 1300. An obvious distinction is made in cases of a trial conducted by a judge sitting without a jury. *Bridges* v. *California*, 314 U.S. 252.

In federal courts, the proper amount of care is exercised to protect the right to an impartial trial under the Sixth Amendment. The publication of prejudicial material during trial is frequently grounds for new trial or mistrial, even though neither the prosecution nor any other governmental agency were responsible for the publications. *Marshall* v. *U. S.*, 360 U.S. 310. *U. S.* v. *Montgomery*, 42 F. 2d 254. *Coppedge* v. *U. S.*, 272 F. 2d 504; *U. S.* v. *Ogden*, 105 F. 371; Annotation 3 L. Ed. 2d 2004. The pre-trial publication of prejudicial material is grounds for change of venue or continuance, particularly when the source of the preju-

dicial material is the U. S. Attorney or some other governmental agency. *Delaney* v. *U. S., supra; U. S.* v. *Florio*, 13 F. R. D. 296.

California courts have found error to deny a change of venue when the prejudicial material published before trial emanated from a Superior Court Judge. *People* v. *McKay*, 37 C. 2d 792, 236 P. 2d 145. Other California cases have discussed the pre-trial publication of prejudicial material which did not have as its source the prosecutor or any other state official. *People* v. *Gomez*, 41 C. 2d 150, 258 P. 2d 825; *People* v. *McCracken*, 39 C. 2d 336, 246 P. 2d 913. *People* v. *Suesser*, 132 Cal. 631, 64 P. 1095. *People* v. *Yoakum*, 53 Cal. 566.

Cases involving the pre-trial publication of prejudicial material which has been released by the district attorney and associated in public officers are different and should be treated differently. *Delaney* v. *U. S., supra; In Re Savoy, supra. Stroble* v. *California, supra. Shepherd* v. *Florida, supra.*

First of all, it has been stated by this court and the California Court on many occasions that the district attorney is a representative of a sovereign state with a duty to refrain from improper methods calculated to produce a wrongful conviction. *Berger* v. *U. S.*, 295 U.S. 78. As the California court has stated in *People* v. *Hail*, 25 Cal. App. 342 at P. 361, 143 P. 803:

> "The district attorney represents the majesty of the law which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means."

The deliberate and calculated publication of prejudicial material prior to trial by the district attorney is substan-

tially similar to other conduct which has been condemned and held to be in violation of due process. The prosecutor's knowing use of perjured testimony violates due process. *Napue* v. *Illinois*, 360 U.S. 264. The willful suppression by the prosecutor of evidence favorable to the defendant violates due process. *U. S. ex rel. Almeida* v. *Baldi* (C.A. 3d), 195 F. 2d 815. A conviction obtained by the use of a coerced confession violates due process. *Chambers* v. *Florida*, *supra*. Due process is violated when a conviction rests upon evidence obtained by brutality or methods which "shock the conscience". *Rochin* v. *California*, *supra*. Although not directly involving due process, an analogous situation is the exclusion of evidence obtained by unlawful search and seizure. *Weeks* v. *U. S.*, 232 U.S. 383. *People* v. *Cahan*, 44 C. 2d 434, 282 P. 2d 905.

Secondly, when the quoted source of the publications is a known public official, the recipient is likely to consider the published information authoritative. District Attorney Gustafson had been an elected official for over eight years and was widely known in the County of Ventura. His published statements would be more likely to impress the recipient than those of someone less known and not in a public office (Tr. 17). Further, the district attorney's published comments represented that he had personal knowledge of the facts of the case (Exhibits 13, 14, 3, 16, 17, 18, 9, 8, A-54). As district attorney he was in a position to receive information first and therefore able to cause the first publication with consequent greater impact (Exhibit 14).

The district attorney obviously had ready access to representatives of public news media (Exhibits 3, 16, 18, 8). The district attorney released prejudicial material for publication at a time and in a manner calculated to achieve the greatest impact (Exhibits 3, 8).

Further, the most effective remedy for dealing with the evergrowing problem of trial by newspaper concerns the

sources. In the note, *"Controlling Press and Radio Influence on Trials"*, 63 *Harv. L. Rev.* 840, the following control remedies are discussed; (1) Voluntary action by press and radio; (2) A cause of action by the injured person; (3) Change of venue; (4) new trial; (5) contempt action; (6) preventing disclosure to the press. The note comments upon the relative ineffectiveness of each remedy.

An interesting analogy is the California Supreme Court's consideration of various remedies to the unlawful search and seizure problem in *People* v. *Cahan, supra.* The California Supreme Court's conclusion as to the most effective remedy resulted in California's adopting the *Weeks* exclusionary rule of evidence as the remedy to the unlawful search and seizure problem.

In petitioner's case, District Attorney Gustafson was an experienced attorney and prosecutor. Despite repeated court rulings regarding his solemn obligation to deal fairly, despite repeated Court comments condemning the pre-trial publication of prejudicial material, and despite ethical restraints suggested by Canon 20 of the Canons of Professional Ethics of the American Bar Association, he willfully and deliberately engaged in trial by newspaper of a flagrant and contemptuous variety. As the California Supreme Court selected the exclusionary rule of evidence as the most effective control of the unlawful search and seizure problem, this court should select the most effective remedy to the pre-trial publicity problem by holding that conduct such as engaged in by the district attorney in petitioner's case is violative of due process.

C. *The character of the material published in petitioner's case was highly inflammatory and prejudicial.*

The character of the pre-trial publications is an important consideration. The pre-trial publication of a defendant's

alleged confession has been disapproved. *Stroble* v. *California, supra; Shepherd* v. *Florida, supra.* The publication of other offenses committed by the defendant has been condemned. *Delaney* v. *U. S., supra. U. S.* v. *Montgomery, supra.* Publications referring to the defendant by defamatory epithets is grounds for change of venue. *People* v. *Fernandez,* 89 N.Y.S. 2d 421. Publications of material inferring that the defendant was attempting to intimidate witnesses has been grounds for change of venue. *People* v. *Lucas,* 228 N.Y.S. 31.

Reference may be made to related cases dealing with the question of improper conduct by the district attorney in trial. It has been held to be improper argument for the district attorney to refer to the defendant by defamatory epithet. *People* v. *Talle,* 11 C.A. 2d 650, 245 P. 2d 633; *People* v. *Tufts,* 167 C. 266, 139 P. 78. It is error for the prosecutor in argument to infer personal belief that the defendant is guilty. *People* v. *Hidalgo,* 78 C.A. 2d 926, 179 P. 2d 102. It is error to cross-examine regarding prior convictions unless properly done for impeachment purposes. *People* v. *Braun,* 14 C. 2d 1, 92 P. 2d 402. It is error to appeal to patriotism and national emergency. *Viereck* v. *U. S.,* 318 U.S. 236. It is error to appeal to public interests. *Robinson* v. *U. S.* (CA 8), 32 F. 2d 505. It is error to urge conviction because of the prevalence of crime. *Turk* v. *U. S.* (CA 8), 20 F. 2d 129. Statements tending to arouse prejudice against a defendant because of non-residence is error. *Haywood* v. *Alabama Fuel & I. Co.,* 203 Ala. 550, 84 So. 259; *Peoria B & C Traction Co.* v. *Vance,* 234 Ill. 36, 84 N.E. 607; *Johnson* v. *Michigan Mutual Savings Association,* 242 Mich. 558, 219 N.W. 736. The situation of argument during trial is much less damaging because there is opportunity for the trial judge to order improper argument stricken and to admonish the jury to disregard it. Anno. 78 ALR 1438.

The pre-trial publications in petitioner's case contained material which would not have been admissible in court. Statements of the deceased are not admissible unless there is an issue of self defense or suicide. *Shepherd* v. *U. S.*, 290 U.S. 96. *People* v. *Talle, supra.* Evidence of grief of relatives of the deceased is not admissible in evidence and even such manifestations of grief during trial can constitute reversible error. Anno. 46 ALR 2d 950. Evidence of lie detector tests or the refusal to take a lie detector test by a defendant or witness may not be admitted. *People* v. *Aragon*, 154 C.A. 2d 646, 316 P.2d 370; *People* v. *Carter*, 48 C. 2d 737, 312 P. 2d 665. Unless supported by the evidence, it is improper to infer in argument that a witness was fearful of her safety by reason of testimony against defendant. *People* v. *Kirkes*, 39 C. 2d 719, 249 P. 2d 1. While the propriety of self-glorifying statements by the prosecutor in court have not been directly ruled upon, such comments would clearly be improper and not based upon evidence. *People v. Hidalgo, supra. People* v. *Talle, supra.*

D. *The pre-trial publications caused an atmosphere of community hostility wherein petitioner could not receive a fair trial.*

This court has ruled that the right to freedom of expression may not be abridged unless the publications by nature and under the circumstances constitute a clear and present danger. *Schenck* v. *U. S.*, 249 U.S. 47; *Gitlow* v. *New York*, 268 U.S. 652. The clear and present danger test has been applied to cases in which the publications contained defamatory material concerning defendants already convicted by jury and were directed to the trial judge concerning sentence to be imposed. *Bridges* v. *California, supra.* This court has also ruled that publications critical of rulings in a civil case are protected by the clear and present danger

test. *Craig* v. *Harney*, 331 U.S. 367. Of course, petitioner's case involves the right of freedom of expression only indirectly to the extent that such exercise of the right interfered with or denied petitioner due process. The constitutional freedom of the press does not include the right to discuss the question of guilt or innocence of the accused. *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912.

The reporting of the case was through dramatic language and methods. The publications were filled with suspense and mystery and speculation. Each occurrence reported was exploited in a spectacular way with the publication of headlines and photographs. The district attorney and associated law enforcement officers were portrayed as great heroes, and petitioner and co-defendants were depicted as despicable villains. The witnesses and the jurymen became prominent individuals. As examples:

> "LEAD SOUGHT IN BIZARRE PLOT. The case, which if written as fiction, would be rejected by any editor as too improbable . . ."
>
> Exhibit 5. "Higgins, a 40 year old ex-torpedoman in the Navy, now retired, became a local hero in the proceedings when he obtained a confession . . ."
>
> Exhibit *A-1*. "PRESS READY TO TURN OUT FOR DUNCAN MURDER TRIAL.' The Duncan Case will make the third time Gustafson has asked a Ventura County jury for the death penalty. The other two times, jurors gave him what he asked . . ."

Judge Blackstock furnished public news media with the opportunity for courtroom photography which became a vehicle for sensational reporting. Still photographs and movies were openly permitted by the trial judge of actual court proceedings, of witnesses testifying, of counsel argu-

ments, of counsel questioning prospective jurors on voir dire examination, and whatever else may have transpired in the courtroom whether the court was in session or not. Throughout the trial proceedings, all of the substantive evils were present which had originally prompted the adoption of Canon 35 of the American Bar Association Canons of Judicial Ethics. 46 ABAJ 840; 44 ABAJ 760; 42 ABAJ 341; 41 ABAJ 55; 40 ABAJ 838; 39 ABAJ 568; *Tribune Review Publishing Co.* v. *Thomas,* 153 F. Supp. 486, 104 *U. Pa. L. Rev.* 603. Of greater significance, however, was the fact that the published photographs and published moving pictures served to magnify and intensify the already existing hostility and prejudice of the community toward petitioner and co-defendants. The publication by the news media of such photographs and moving pictures increased the already over-dramatization of the case. Moreover, Judge Blackstock's announcement that photography would be permitted served as an invitation to greater press coverage of the case.

The community hostility and prejudice did not subside prior to trial. In *Stroble* v. *California, supra,* this court took into consideration the fact that unfavorable publicity subsided within a short period of time after arrest and initial court processing. The California courts have also considered this factor. *People* v. *Burwell,* 44 C. 2d 16, 279 P. 2d 744. In petitioner's case, from December 15, through December 26, 1958, public news media published detailed phases of the investigation along with the inflammatory statements of the district attorney urging the death penalty for petitioner and co-defendants; from December 26, 1958, to February 16, 1959, news media concerned itself with a publicity build-up for the trial with the publication of verbatim passages from the Grand Jury transcript, accounts of preliminary motions and appearances of petitioner and co-

defendants in court, the trial judge's comments about the change of venue and the district attorney's published statements about why petitioner and co-defendants should receive the death penalty. From February 16, through April 3, 1959, public news media bombarded the public with pictorial and verbal accounts of the trial of co-defendant Duncan. From April 6, 1959, through April 14, 1959, news media described the trial and death sentence and trial judge's compliments to the jury in the case of co-defendant Baldonado. News media kept public prejudice and hostility alive up to April 16, when petitioner made his second motion for change of venue prior to his trial commencing on April 20, 1959.

Some indication of the atmosphere of the community is reflected in the publications themselves as observed by Judge Kallodner in his dissenting opinion in *U. S.* v. *Handy*, (CA 3), 224 F. 2d 504.

> Exhibit 9, Star Free Press, December 29, 1958. (Editorial) "DOING THE DIRTY WORK FOR THOSE NEIGHBORS"
>
> Exhibit *27*, Press Courier, December, 1958 (Editorial). "THE DEATH PENALTY".

There were innumerable public outbursts of hostility and prejudice. These instances included the reported assault upon co-defendant Duncan (Exhibit 2), the reference to petitioner and co-defendant by vile epithets (Tr. 15), expressions of courtroom spectators of disapproval of the plea of not guilty by reason of insanity of co-defendant Duncan (Tr. 16). The courtroom spectators' expression of disapproval as counsel for petitioner suggested a later trial date (Tr. 16), the necessity of petitioner and co-defendants being brought to the courtroom and returned

through rear doors to prevent turmoil (Exhibit 1), reports of threatening letters received by co-defendant Duncan (Exhibit A-40), derogatory remarks by courtroom spectators to the son of co-defendant Duncan (Exhibit A-50), courtroom spectator applause when Judge Blackstock denied co-defendant's motion for new trial (Exhibit A-50), and reports of persons coming to the Courthouse at 3:30 A.M. in order to be first in line for courtroom seats (Exhibit A-51).

A significant factor in *Stroble* v. *California, supra, Palakiko* v. *Harper* (CA 9), 209 F. 2d 75, was that counsel for defendant failed to make any motion for change of venue. This factor was not considered determinative in *Delaney* v. *U. S., supra.* In petitioner's case, petitioner moved for change of venue at an early stage of the proceedings supported by affidavits evidencing the widespread hostilities and prejudice (Tr. 14-23). Again prior to trial, petitioner moved for change of venue supported by affidavit showing the continuing prejudice and hostility (Tr. 62-71).

This court commented in *Stroble* v. *California, supra,* that there was no showing that the jurors had read any of the pre-trial publications complained of. It was also commented upon in *Delaney* v. *U. S., supra,* that the defendant had not exhausted all his preemptory challenges. In the case at issue, petitioner did exhaust all his preemptory challenges. Further, each of the jurors stated on voir dire examination that he or she had read some of the pre-trial publications concerning the case. In fact, five of the twelve regular jurors had formed an opinion as to what penalty should be imposed upon petitioner, based on reports of public news media (Tr. 191-349). Jurors, of course, are "extremely likely to be impregnated by the environing atmosphere". *Frank* v. *Mangum, supra.* The limitations of

voir dire examination have been recognized in *Coppedge* v. *U. S.*, *supra*, wherein the court stated, "it is too much to expect of human nature that a juror would volunteer in open court, before his fellow jurors, that he would be influenced in his verdict by newspaper story of the trial". The inherent limitations of voir dire examinations are similar to court instructions and the statement in *Krulewitch* v. *U. S.*, 336 U.S. 440, at P. 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction". The statement of a juror that reading a prejudicial newspaper article has not influenced him should not be considered conclusive. In *Delaney* v. *U. S.*, *supra*, Justice Magruder, in commenting upon the average juror's inability to overcome the prejudicial effects of intense publicity, said: "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconception as to probable guilt, engendered by pervasive pre-trial publicity." See also 63 Harv. Law Rev. 840; 34 N. Y. Univ. Law Rev. 1278; *Murphy and Newcomb, Experimental Social Psychology* (1937), pp. 961 through 969; *Cantrill and Allport, Psychology of Radio*, pp. 177-180; *Doob, Public Opinion and Propaganda* (1948), 337; 14 U. Pitt. Law Rev. 614.

Section 1076 of the California Penal Code was not intended to apply in a change of venue question. As stated by the California Supreme Court in *People* v. *Suesser*, 132 Cal. 631: "A fair trial cannot be had where an unbiased jury cannot be had, and a juror who has an unqualified opinion that defendant is guilty, founded upon a knowledge of material facts of the case, does not possess a common law qualification for a juror and it does not matter how

that knowledge was obtained, provided the juror believes it." In the *Suesser* case, it was contended that the opinions formed by jurors were based upon rumor or newspaper reports and therefore the juror was not disqualified and a change of venue was not warranted. In *People* v. *Plummer*, 9 Cal. 298, the California Supreme Court stated: "It is intended that jurors, before acting as such, shall know nothing of the matter in difference, or of the parties; that their mind shall not be preoccupied, but they shall be prepared to receive and to weigh such truths as may be submitted to them . . . The very meaning of the word trial, which is an examination by a test, shows that the triers are to act not upon previously formed opinions, but upon inquiry, first instituted and carried on before them."

III

The Trial Judge Did Not Act Reasonably in Denying Motions of Change of Venue and in Other Pertinent Matters.

A. *The trial judge appeared to misinterpret the effect of a change of venue and his published comments implied to the public that a motion for change of venue was an attack upon the integrity, decency and humanity of the people of Ventura County.*

Judge Blackstock, age 83, presided throughout the proceedings and trials in petitioner's case and in the cases of co-defendants Du[illegible] and Baldonado. A factor considered important in *Stroble* v. *California, supra,* and in *Delaney* v. *U. S., supra,* was that the trial judge exercised great care to insure that prejudicial influences from outside the courtroom did not cause any interference with the trial. This positive factor was not present in petitioner's case. Not only did the trial judge do little or nothing to

prevent the pre-trial publicity and community hostility from interfering with the trial, he actually contributed to the already existing community hostility by comments which were published prior to petitioner's trial and by permitting the widest possible press coverage of the proceedings and cases prior to petitioner's trial.

It does not appear that Judge Blackstock fully understood the meaning and effect of a change of venue. In *People* v. *Fernandez, supra,* at 437, it was stated:

> "A decision of this kind (change of venue) is sometimes misunderstood by the public. Therefore, it should be noted that where a change of venue is allowed, no reflection is cast upon the fair-mindedness of the jurors of the County from which the case is removed."

In *U. S.* v. *Parr,* 17 F. 512, in making reference to affidavits for change of venue, on page 517, it was stated:

> "Some of them apparently were so uninformed about the law and court procedure that they erroneously regarded the motion by defendant for a change of venue as a reflection on the people of Corpus Christi."

In denying petitioner's first motion for change of venue on January 15, 1959, Judge Blackstock commented in reference thereto:

> "It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County" (Tr. 137).

This comment not only illustrated misunderstanding by the trial judge about the effect of a change of venue, but

this comment also was published in public news media (Exhibit A-2) and served to imply to the public that petitioner and counsel were attacking the integrity, decency and humanity of the people of Ventura County by moving for a change of venue.

B. *The trial judge appeared to believe that jurors' opinions based upon public news media reports were immaterial.*

During the hearing of petitioner's second motion for change of venue on April 16, 1959, petitioner submitted affidavit verifying the community hostility and incorporating by reference in the affidavit some 89 newspaper exhibits. No counter affidavits were submitted by the prosecution. In discussion on the motion, Judge Blackstock stated the opinion that the newspaper publications were not material to a motion for change of venue because of Section 1076 of the Penal Code.

"The Court: Well, opinions formed from newspaper articles are immaterial, anyway.

Mr. Henson: They might be immaterial legally, your Honor, but, actually, they certainly are material and I think your Honor will agree with that, won't you?

The Court: That the newspaper articles are material?

Mr. Henson: I am saying that they are actually material as to a person's state of mind. I read a newspaper. I read the same newspaper three months and I hear of nothing on the front page except the Elizabeth Duncan case, Baldonado case and the Moya case. How can I help but forming some opinion?

Furthermore, Judge Blackstock foreclosed any objective inquiry into the change of venue question by his statement in ruling on petitioner's second motion of change of venue by his statement that he had "absolute confidence" in the people of Ventura County (Tr. 170).

C. *The trial judge's published compliment to juries in co-defendants' cases which returned death verdicts were prejudicial to petitioner.*

Petitioner's trial followed the trial of co-defendant Duncan and co-defendant Baldonado. With knowledge of this fact, Judge Blackstock proceeded to compliment the juries which returned death penalty verdicts in each of the co-defendants' cases, and which compliments were published.

> Exhibit A-36, March 21, 1959, Star Free Press. "MRS. DUNCAN TO DIE". "A few moments later, Judge Blackstock discharged the jury. He commended jury members for being an exceedingly careful and conscientious jury and said 'the people of the State of California are very grateful for your services.'"
>
> Exhibit A-86, Press Courier, April 9, 1959. "BALDONADO GETS GAS CHAMBER; JURY DELIBERATES LESS THAN TWO HOURS." "The jury was polled and Judge Blackstock said 'the jury is unanimous as it has to be'. He complimented the jurors as thoughtful and conscientious and said 'they showed the proper amount of courage and I am proud of you'".

These comments which were published prior to petitioner's trial were extremely damaging for the reason that the effect was to place the judicial seal of approval upon

prejudicial and inflammatory statements previously published by the District Attorney and other law enforcement officers and coincided with the following:

> Exhibit A-86, March 21, 1959, Star Free Press: "District Attorney Roy A. Gustafson hailed the verdict and said it should have an effect on heading off moves to abolish the death penalty in California."

The propriety of a Trial Judge in making himself present at the trial of a co-defendant has been considered by this Court in *U. S.* v. *Handy,* 351 U.S.. 454. The propriety of a comment in a co-defendant's case was also considered therein. It is worthy of note that the published comments of the trial judge in *U. S.* v. *Handy, supra,* were not read by any members of the jury. In *North Carolina* v. *Baldwin,* 178 NC 687, 100 SE 348, the remarks of a trial judge in a co-defendant's case were held not to be error when it was not shown that any jurors in the subsequent case of a co-defendant heard the remark.

However, in petitioner's case, it was shown that Judge Blackstock's published comments to co-defendant Baldonado's jury were read by a prospective juror and such voire dire examination necessarily brought this matter to the other prospective jurors.

> Q. (Juror Germann) And did you read that the co-defendants, the defendants, Elizabeth Duncan and Augustine Baldonado, both received the death penalty?
>
> A. Yes, I did.
>
> Q. And did you read in the Oxnard Press Courier that Judge Blackstock complimented the jury in the Augustine Baldonado case for their verdict?
>
> A. Yes, I did.

Q. You no doubt know of Judge Blackstock, do you not?

A. Yes (Tr. pp. 217-218).

The problem involved is somewhat analogous to the situation where the trial judge comments in open court expressing his belief concerning an ultimate fact of the case. *U. S.* v. *Murdock*, 290 U.S. 389; *People* v. *Mahoney*, 201 Cal. 618, 258 P. 607; *People* v. *Earl*, 10 CA 2d 163, 51 P. 2d 147; *People* v. *Johnson*, 11 CA 2d 22, 52 P. 2d 964.

D. *The trial judge did not act reasonably in other pertinent matters affecting the trial.*

This was not a case wherein the trial judge permitted a broad scope of voir dire examination. An example of the voir dire is the following:

"Q. Mrs. Weidemann, let me ask you this: As a result of reading in the newspapers about the Olga Duncan murder case and the trials of Elizabeth Duncan and Augustine Baldonado, did you form any opinion as to what penalty should be imposed upon this defendant Luis Moya?

A. Yes.

Q. Do you have that opinion now?

A. At this moment, yes.

Q. Would it take evidence to remove that opinion from your mind?

A. Yes.

Q. Even though Judge Blackstock instructs you that you must disregard your personal opinions in this case, could you do that? That is, do you think you could possibly wipe this opinion out of your mind and judge this case just on the evidence here?

Mr. Gustafson: I'm objecting to that, your Honor, as something that assumes a qualification that the law doesn't. The law doesn't require that any juror wipe an opinion out of his mind. It simply is that the juror, notwithstanding the opinion, can fairly and impartially try the case.

The Court: That's right.

Mr. Henson: All right. I'll reframe the question.

Q. Even though you do have this opinion as to what penalty should be imposed upon this boy, you think that notwithstanding that opinion, you could judge this case fairly and impartially?

(fol. 79) A. I feel that I could.

Q. Would it be difficult for you to do so?

A. I don't think so.

Q. I appreciate your being so honest.

The Court: She has already said she would predicate any opinion that she might arrive at entirely and absolutely upon the evidence that she hears in this case, and I don't see any point in repeating the same questions that are propounded by the court.

Mr. Henson: Well, it's only this, your Honor, I don't mean to prolong this, but sometimes people don't quite understand, and I'm just trying to bring it out a little bit more here in a different way.

The Court: Well, you can't assume that an intelligent looking person doesn't understand a plain unequivocal question. You understand absolutely that any verdict you arrive at must be predicated or based on the evidence in this particular case right here that we're trying now. You understand that, don't you?

Prospective Juror: I do, your Honor.

Mr. Henson: Well, your Honor, even though she understands it, I'm asking if she could do that?

The Court: Well, she already told me that she can do it and that she will do it; isn't that right?" (Tr. 225 & 226).

The denials for change of venue were made by Judge Blackstock with full knowledge of all the matters contained in Section II of this brief. While a question of change of venue is a matter resting within the discretion of a trial judge, the California Supreme Court has noted in *People* v. *Lee*, 5 Cal. 353, "It is not to be supposed that we will trust implicitly the discretion of inferior courts."

The discretion exercised by Judge Blackstock may be judged from a reading of the entire record of petitioner's case and the records of the cases of co-defendants Elizabeth Duncan and Augustine Baldonado. Other matters cited as error were previously submitted to this Court by way of petition for writ of certiorari.

It cannot be contended that the measurement of due process is in any way affected by the nature of the offense. As this Court stated in *Chessman* v. *Teets*, 354 U.S. 156 at p. 165:

"On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in

this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

Conclusion

Petitioner was deprived of a fair trial within the meaning of the due process laws of the Fourteenth Amendment by reason of an accumulation of circumstances which included extensive pre-trial publications primarily engendered by the prosecutor and other law enforcement officers which publications contained highly prejudicial and inflammatory material. The result of the publications was an atmosphere of community hostility and prejudice. The trial judge did not exercise sound discretion in denying petitioner's two motions for change of venue and by contributing to the community hostility and prejudice by his published comments implying that counsel for petitioner was attacking the humanity, decency and integrity of the people of Ventura County by a motion for change of venue, by permitting widespread publicity of a trial of a co-defendant occurring prior to petitioner's trial, and further by the trial judge's published remarks approving and commending and complimenting the verdict of juries in the cases of co-defendants Duncan and Baldonado which preceded petitioner's trial.

It is respectfully submitted that the judgment below be reversed and the cause remanded for retrial on the issue

of penalty in a county in California other than Ventura County.

Respectfully submitted,

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